IN THE HIGH COURT OF BOMBAY AT GOA
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CRIMINAL APPEAL NO. 5 OF 2002

Shri Mohammad Gauns Khan,
s/o Haider Rashid Khan,
native of North Kalanguda,
Malkajruiri, Secundarabad,
Andhra Pradesh, presently
in custody at Central Jail,
Aguada, Goa. ... Appellant

Versus

S T A T E ... Respondent.

Shri S. G. Bhobe, advocate for the appellant.

Shri S. N. Sardessai, Public Prosecutor for the State.

CORAM : R. J. KOCHAR &
P. V. HARDAS, JJ.

DATE : 2nd September, 2003.

ORAL JUDGMENT (Per Hardas, J.)

The appellant/accused who stands convicted for offences punishable under Section 302 and Section 324 of the Indian Penal Code and sentenced to suffer imprisonment for life and sentenced to Simple Imprisonment for three months and a fine of Rs.1,000/-, in default to undergo Simple Imprisonment for one month respectively, by the learned Sessions Judge, South Goa, Margao, by Judgment dated 29th September, 2001, in Sessions Case No.24/99, has filed the present Appeal challenging the aforesaid conviction and sentence.

2. The facts in brief as are necessary for the decision of this Appeal are set out hereunder.

Dy.S.P. Waman Tari, P. W.16, was in charge of the Margao Town Police Station as a Police Inspector. On 7th February, 1999, at about midnight he recorded the complaint of P.W.10, Basavraj at Exh.27. Since one Umesh and P.W. 15, Hanumanthappa Hugar were reported to have received injuries, P.W. 16, Dy.S.P. Waman Tari, directed A.S.I. Uttam Raut Desai to take the injured for medical examination. Meanwhile, P.W.13, A.S.I. Raut Desai, conducted the inquest panchanama of the deceased, one Heerappa, son of Fakirappa Dodamani in the Hospicio Hospital at Exh.8, in the presence of P.W.1 Maruti Hosmani. The Clothes of the deceased also came to be attached. The dead body of the deceased was referred for post-mortem examination. The accused who was arrested was subsequently referred for medical examination and the doctor was requested to take the nail clippings, hair sample, etc. vide letter at Exh.21. From the evidence of P.W.16, Dy.S.P. Waman Tari, it transpired that before the accused was arrested a search was made for the accused and at 2.30 a.m. he was arrested from a jungle area on a hillock. The arrest panchanama of the accused is at Exh.10. The clothes of the accused which consisted of one long-sleaved shirt, a half pant, a banian and a leather purse were attached. The arrest panchanama and attachment panchanama were done in the presence of P.W.2, Basavraj Madar. P.W.16 then proceeded to the scene of offence at about 8 a.m. and drew the scene of offence panchanama at Exh.12 in the presence of P.W.3, Amarnath Gaonkar. From the scene of

offence, P.W.16 attached a pair of chappals at M.O.6 and one shawl. He drew the rough sketch of the scene of offence which is at Exh.13. The accused was interrogated while in custody and the accused is alleged to have made a disclosure statement expressing his willingness to point out the place where the coita (weapon of assault) was hidden by him. The said statement was made in the presence of the panch witness P.W. 4, Arvind Thengshe and the disclosure statement is at Exh.15. The accused alongwith the pancha and the police proceeded to the place where the said coita is alleged to have been hidden, which was in the bushes. Near the bushes from a pile of wood, the accused is alleged to have removed the coita. Some blood stains were noticed on the blade of the coita and also some hair which had adhered to the coita was also noticed. The coita is M.O.10. On the same day, in the evening, the statement of P.W.15, Hanumanthappa and P.W.7, Caetano Remedios Dourado, was recorded. On 8th February, 1999, the statement of P.W.6, Philip D'Sa, as recorded.

3. During the investigation, it transpired that the accused had purchased the said coita from P.W.8, Vikas Zantye. The Executive Engineer was requested to prepare the sketch of the scene of the offence and the sketch was prepared by P.W.12, Menino Fernandes, and the sketch is at Exh.36. The muddemal article was sent to the Chemical Analyser and the report of the Chemical Analyser is at

Exh.34. As per the report of the Chemical Analyser the hair which was found adhering to the blade of the coita, did not match with the sample hair of the deceased which was sent for examination. In respect of the blood stains on the clothes of the accused, the Chemical Analyser had opined that they were of human blood, but the group could not be determined. The blood group of the deceased was A Rh positive, while that of the accused was B Rh positive.

4. After completion of the investigation, the chargesheet came to the filed by P.W.17, P.I. Umesh Gaonkar.

5. After committal of the case to the Court of Sessions, the learned Sessions Judge, South Goa, Margao, vide Exh.5 framed charge against the appellant/accused. The appellant/accused denied the charge and claimed to be tried. The prosecution, in support of its case, examined 17 witnesses. The prosecution had examined P.W.10 and p.W.15 as eye-witnesses to the incident, while P.W.6, Philip D'Sa and P.W.9, Mildred D'Sa, were examined on the point of oral dying declaration said to have been made by the deceased. P.W.7, Caetan Remedios Dourado, was examined in respect of the extra-judicial confessions of the accused/appellant. The learned trial Court accepted the evidence of the two eye-witnesses as well as the evidence in respect of the oral dying declaration, as also the evidence in respect of the extra-judicial confession and by his finding recorded in the

judgment, convicted and sentenced the appellant/accused as aforestated.

6. Shri S. G. Bhobe, learned counsel appearing on behalf of the appellant/accused has urged before us that the evidence of P.W.10, Basavraj Dodamani and P.W.15, Hanumanthappa Hugar, apart from being inconsistent inter se, is not reliable as accepting the evidence of either of the witnesses necessarily entails the rejection of the testimony of the other. Shri Bhobe has further submitted that the prosecution evidence can broadly be classified into two groups, one consisting of the evidence of the eye-witnesses and the other group consisting of the evidence of P.W.6, Philip D'Sa, P.W.9, Mildred D'Sa and P.W.7, Caetan Remedios Dourado. If the evidence is examined minutely, it would appear that there is thread of inconsistency in the evidence of these witnesses and, as such, according to the learned counsel for the appellant/accused, the entire prosecution case deserves to be jettisoned. In respect of the discovery under Section 27, it is stated that according to P.W.16, Dy.S.P. Waman Tari, the disclosure statement at Exh.15 is alleged to have been made by the accused at 9.30 in the morning. This is also stated by the panch witness P.W.4, Arvind Thengshe. Shri Bhobe has submitted that a perusal of the scene of offence panchanama at Exh.12 would show that the scene of offence panchanama commenced at 8.30 in the morning and was concluded at 9.30 a.m. The disclosure statement of

P.W.15 shows that the said disclosure was made by the appellant/accused at 9.15 in the morning. The timings of the said two documents, therefore, according to the learned counsel for the appellant/accused, belie the fact that the appellant/accused had made a disclosure statement. According to the learned counsel for the appellant, P.W.16, Dy.S.P. Waman Tari, in order to overcome the discrepancy in the timing has stated on oath that the appellant/accused made the disclosure statement at 9.30 in the morning.

7. Shri Sardessai, learned Public Prosecutor appearing on behalf of the State, has urged before us that undoubtedly there are slight discrepancies in the evidence of P.W.10 and P.W. 15, but the discrepancies are of peripheral nature and do not merit rejection of the evidence of these two eye-witnesses. According to him, this is a case where the truth can be separated from the falsehood, an exercise performed by the learned trial Court, and the evidence of the witnesses, therefore, can be relied upon. He has further urged before us that slight discrepancy in respect of the timing would not warrant the rejection of the discovery of coita at the instance of the appellant/accused.

8. Before we advert to the other evidence, a reference may be usefully made to the evidence of P.W.10, Basavraj Dodamani, who apart from being an eye-witness, is also the first informant, who had lodged his report at

Exh.27. P.W.10 Basavraj states that the deceased Heerappa was his brother. The appellant/accused was a mason and was working for one contractor named Jadav. He has further stated that he, deceased Heerappa, his father Fakirappa and the accused were working at Borda at the site of a construction of a building. P.W.15, Hanumanthappa Hugar, was residing at the site in a hut. The accused was residing alongwith P.W.10, Basavraj, his father and the deceased. According to him, he alongwith one Umesh had gone to the market and returned at about 9 p.m. While they were sitting in the hut they heard the shouts of his brother Heerappa. On hearing the shouts, both Umesh and P.W.10, Basavraj came out of the house. They noticed that deceased Heerappa was screaming near the building where they were working. The witness saw the appellant/accused assaulting Heerappa with a coita. Seeing the assault, the witness intervened and attempted to separate them. One Umesh, who despite the best efforts of the prosecution could not be traced and, therefore, was not examined in the trial, also attempted to separate the deceased and the accused. According to P.W.10, Basavraj, he had seen the accused hitting his brother with a coita above the eye. The appellant/accused also attempted to assault P.W.10, Basavraj. Accordingly, P.W.10, Basavraj and Umesh ran away from the scene. According to the witness, Heerappa, the deceased, also followed him. The deceased ran near the house of "patrao" (patron), but since he did not meet the patron there

the accused who was following him, again assaulted the deceased. P.W.10, Basavraj saw his brother fall in front of the building. According to him, one owner of the Bar caught the accused. He went near his brother Heerappa, who was asking for water and gave him water. Meanwhile a police vehicle came there and in the Police vehicle Heerappa was taken to the Hospital. P.W.10 also accompanied the deceased. After the deceased breathed his last in the hospital, P.W. 10, Basavraj went to the Police Station and lodged his complaint at Exh.27. The witness further states that the deceased Heerappa had told him that the accused had a fight with him. He has identified the coita as the same coita by which the accused is alleged to have inflicted the injuries.

9. In cross-examination he has admitted that in the locality there were about 20 persons who were residing. He has further admitted that he had seen the assault on his brother from a distance of 6 to 7 metres. He has further admitted that it was dark and there were no lights. He has denied the suggestion as not true that on the night of the incident he alongwith his family members had gone to the hut of the accused to assault him with sticks and coita. He has further denied as not true that because of that the accused had run away and they had chased the accused. According to him the Police were called by the family of "patrao" (patron). An omission was brought out in the cross-examination also in respect of the deceased following

P.W.10 Basavraj and Umesh and in turn being chased by the accused. According to him, he had seen his deceased brother Heerappa being assaulted only once.

P.W.15, Hanumanthappa Hugar, states that he knew the contractor by name Jadav, who had four labourers working under him and the four labourers were working at the construction site. He has admitted that he knew Fakirappa Madar and two sons, deceased Heerappa and P.W.10, Basavraj. According to him, he was residing at the construction site of Nanu Builders at Borda. On the day of the incident, he had finished his work at about 6 p.m. and had prepared his food at about 7 p.m. At 8 p.m. he had eaten food alongwith the deceased Heerappa. The accused was present but declined to have food as he had already eaten. According to him, the appellant/accused had chased him and had dealt a blow with a coita on the face of the deceased Heerappa. He intervened to separate them and the appellant/accused had than dealt a blow with the coita on his jaw and on his hand. The deceased Heerappa on receiving the injuries by coita fell down. The deceased was bleeding profusely. On seeing the assault he ran away due to fear and went to a distance of about 1/2 kms. There he met P.W.10, Basavraj, brother of the deceased Heerappa and narrated to him what had happened. P.W.10, Basavraj, then went to the scene of the incident. According to him some persons had given treatment for the injuries sustained by him. At about 1 a.m. the Police had come and

had taken him to the hospital.

10. In cross-examination the witness has admitted that besides deceased Heerappa, the accused and himself there were no other persons when the incident took place. He has also admitted that there was no light at that place.

11. A perusal of the evidence of these two eye-witnesses would clearly reveal that the evidence of these two eye-witnesses suffers from inter se discrepancies which, according to us, are not of peripheral nature. P.W.10, Basavraj, claims to be an eye-witness to the incident. P.W.15, Hanumanthappa Hugar also claims to be an eye-witness to the incident. P.W.10, Basavraj, does not show the presence of P.W.15, Hanumanthappa at the scene of the offence, whereas according to P.W.15, Hanumanthappa, after the incident he had met P.W.10, Basavraj, 1/2 kms. away from the place of the incident and had narrated the entire incident to him. Thus, acceptance of the evidence of either of the witnesses necessarily entails rejection of the evidence of the other. It is true that in cases where truth and falsehood are so inextricably intertwined the Court has to undertake the exercise of separating the grain from the chaff, in other words, to separate the truth from falsehood. In the present case, however, according to us, such an exercise is not possible, as the truth and the falsehood qua the evidence of P.W.10, Basavraj and P.W. 15, Hanumanthappa,

are so inextricably intertwined that the truth cannot be separated from the falsehood. Apart from that, the acceptance of evidence of either of the witnesses necessarily entails the rejection of the other. Therefore, according to us, no implicit reliance can be placed on the evidence of either P.W.10, Basavraj, or P.W.15, Hanumanthappa. It is true that P.W.15, Hanumanthappa had received injuries and the appellant stands convicted for an offence punishable under Section 324 of the Indian Penal Code in respect of these injuries, but since the substratum of the evidence of P.W.15, Hanumanthappa, is found by us to be highly unreliable, the mere fact that P.W.15, Hanumanthappa, is said to have received injuries cannot lend any credence to his already infirm testimony.

12. P.W.6, Philip D'Sa, states that he was constructing a bungalow at Borda and the accused and the deceased were the labourers employed by the contractor Jadav. According to him, on the date of the incident, at about 9.15 p.m. he and his wife P.W.9, Mildred D'Sa, were returning after attending a wedding. In the beam of the headlight of the car they had seen a person who was identified as the deceased as he approached near and he was found to be bleeding. He stopped his car and the deceased came towards him and told him "Sab Khan mara", meaning thereby that he was assaulted by Khan. Meanwhile he found that the accused followed by some people had come to the scene of the offence

and the accused had a shawl wrapped around his shoulders and neck. He told the accused to wait near the Chapel gate. He informed the contractor and on his arrival the witness accompanied by the contractor went to the Police Station. At the Police Station the contractor gave a complaint. He states that he was also interrogated by the Police. Thereafter, a Police jeep came to the scene and the police took away the accused and the deceased.

13. In cross-examination he has admitted that he does not remember whether the police had recorded his statement. He was asked by the Police to show the scene of the offence and they had prepared some writing. In cross-examination he has given admission that he knows P.W.10, Basavraj, but he did not see him in the crowd. According to him, he and contractor Jadav must have reached the Police Station at about 9.15 p.m. and the police had arrived within ten minutes thereafter.

14. P.W.9, Mildred D'Sa, wife of P.W.6, Philip D'Sa, also deposes in similar vein. In her examination-in-chief she also does not make any reference to either P.W.15, Hanumanthappa or P.W.10, Basavraj, at the scene of the offence.

15. The prosecution has examined P.W.7, Caetan Remedios Dourado, who runs a bar at Borda. According to him,

on the day of the incident at about 9 p.m. while he was about to go on his scooter from his house to the bar he heard some noise from the construction site. The accused came running there and was followed by some persons. He noticed that the accused had blood stains on his shirt. He stopped the accused and asked him what had happened. The accused kept quiet and then said "mara, mara". According to him some persons from the crowd asked the accused as to what had happened and he told them that he assaulted one person. The accused was taken by the said persons to the place where the injured had fallen. In cross-examination he has admitted that he could not tell the names of the local persons who were there in the crowd and who had apprehended the accused. Contradiction was brought on record in respect of this witness apprehending the accused, which statement he denied to have made. He also denied to have stated that the accused went and hid himself in the bushes. Similarly, contradiction was brought in respect of what the accused had actually stated to this witness.

16. P.W.6, Philip D'Sa and P.W. 9, Mildred D'Sa, have stated about the oral dying declaration alleged to have been made by deceased Heerappa to them. According to P.W.6, Philip, he had immediately gone to the Police Station accompanied by the contractor Jadav and Jadav had lodged the report. According to P.W.6, Philip, he was also interrogated by the Police. P.W.16, Dy.S.P. Waman Tari, in his

cross-examination has stated that P.W.6, Philip D'Sa, might have come to report about the case, but he was not sure when the said Philip D'Sa had come. According to him, P.W.6, Philip had come before the report at Exh.27 was recorded. He has further stated that he does not know if Jadav had given any complaint. According to him, he had recorded the statement of P.W.6, Philip D'Sa, on 8th, i.e. two days after the incident. We are unable to subscribe ourselves to the view of the learned trial court in accepting the evidence of P.W.6, Philip D'Sa and P.W.9, Mildred D'Sa, in respect of the alleged dying declaration of the deceased. Prompt recording of the statement of the witnesses, lends a degree of assurance to the Court in accepting such evidence. The prosecution has chosen not to examine the contractor by name Jadav. There are no contemporaneous documents which are produced by the prosecution to fortify the version of P.W.6, Philip D'Sa that he had gone to the Police Station. If the complaint of contractor Jadav was recorded, the production of the said complaint would have gone a long way in establishing the credibility of P.W.6, Philip D'Sa. Even otherwise, the alleged dying declaration is a extremely omnibus and vague statement stating that Khan had assaulted. P.W.6, Philip D'Sa does not show either the presence of P.W.10, Basavraj, or P.W.15, Hanumanthappa at the scene of offence. Neither P.W.10, Basavraj, nor P.W.15, Hanumanthappa, make a reference to the arrival of P.W.6, Philip D'Sa in the car at the scene of the offence. According to us, no reliance at all can be

placed on the testimony of P.W.6, Philip D'Sa, which according to us, is an attempt on the part of the prosecution to bolster its own case.

17. Turning to the evidence of P.W.7, Caetan Remedios Dourado in respect of the extrajudicial confession, the evidence of P.W.7, Caetan, is replete with contradictions on material points. He has denied to have stated the portions with which he was confronted from his police statement. That apart, there is no evidence to show that P.W.7 Caetan was intimately acquainted with the accused. It tasks human credulity for its acceptance that the accused would confess to have committed a crime before a total stranger. Apart from that the evidence of the extrajudicial confession is basically a weak piece of evidence which can only be acted upon by the Court if it is corroborated by other material. In the present case, since according to us the evidence of the two eye-witnesses does not inspire confidence and the evidence of the witnesses relating to the oral dying declaration also does not inspire confidence, the evidence of extrajudicial confession can hardly be used as a prop of justify the conviction of the appellant/accused for the offence punishable under Section 302 of the Indian Penal Code. Even otherwise, the evidence of P.W.7, Caetan, is falsified by the arrest of the accused when he was hiding in the bushes. Thus acceptance of the evidence of this witness falsifies the prosecution case regarding the place of arrest

of the accused.

18. The discovery of coita, M.O.10 at the instance of the appellant/accused vide disclosure statement at Exh.15 made in the presence of P.W.4, Arvind Thengshe cannot be relied upon. Exh. 15 states that the disclosure statement was made at 9.15 in the morning. Undisputedly, according to the prosecution, P.W.16, Dy.S.P. Waman Tari, was at the scene of offence drawing the scene of offence panchanama at Exh.12. The scene of offence panchanama commenced at 8.30 a.m. and concluded at 9.30 a.m. It is incredible that while the scene of offence panchanama was being drawn, P.W.16, Waman Tari could remain present also at the Police Station for recording the disclosure statement of the accused. As a cover-up, P.W.16 has stated that the disclosure statement was made by the accused at 9.30 a.m. Even otherwise, the coita, M.O.10, removed from the pile of wood by the accused, cannot be used as a circumstance by itself to justify conviction. Hair which had adhered to the blade of the coita was sent for chemical analysis alongwith the sample hair of the deceased. Vide Exh.54 the Chemical Analyser opined that the sample hair of the deceased did not tally with the hair which was found adhering to the blade of the coita. The blood on the coita has not been found to be of the same blood group as that of the deceased. All these factors, therefore, necessitate the rejection of the evidence of the prosecution in respect of the discovery of coita at the instance of the

appellant/accused.

19. After giving our anxious consideration to the rival submissions and after perusing the evidence, according to us, the conviction of the appellant/accused is wholly unsustainable.

20. Accordingly, Criminal Appeal No.5 of 2002 is allowed. The conviction and sentence for offences punishable under Sections 302 and 324 of the Indian Penal Code is hereby quashed and set aside and the appellant/accused is acquitted of the offences for which he was charged and convicted. The appellant/accused be set at liberty forthwith, if not wanted in any other case.

R. J. KOCHAR, J.

P. V. HARDAS, J.

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